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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 390

PETER MACHEL,
Petitioner-Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One

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Peter Machel hereby petitions that a writ of certiorari issue to review a judgment entered against him as to certain constitutional issues on the 29th day of April, 1965, by the District Court of Appeal of the State of California, First Appellate District, Division One, as to which hearing was thereafter denied by the Supreme Court of the State of California on

June 23, 1965 in a cause pending in said Court numbered 1 Criminal 4539 in the District Court of Appeal of the State of California and in the Supreme Court of the State of California, above referred to, and entitled "People of the State of California, Plaintiff and Respondent, vs. Peter Machel, Defendant and Appellant."

The judgment and opinion of the District Court of Appeal are reported in Vol. 234, Advance California Appellate (May 18, 1965) at page 38. (See Appendix A for copy thereof.)

Said judgment and opinion reversed a judgment of conviction of said defendant and appellant (petitioner herein) of violation of the Health and Safety Code of the State of California, § 11530, upon the sole ground that certain statements of said defendant testified to were elicited from said defendant in violation of the rule announced by the Supreme Court of the State of California in that certain case entitled *People v. Dorado,* appearing in Vol. 62, Advance California Reports, page 350, as said decision interpreted the opinion of the Supreme Court of the United States in *Escobedo v. Illinois* (1964) 378 U. S. 478.

However, said judgment and opinion determined that the police officer making the arrest and search of said defendant and appellant (petitioner herein) had reasonable cause to believe that defendant was then committing a felony, so as to justify his arrest and a search of defendant's person at night within private

premises and without warrant and the three cigarettes obtained from his pocket were admissible in evidence.

This affirmation by said judgment and opinion of a reasonable cause as to said search, if permitted to stand, becomes the law of the case and is binding on the trial Court upon retrial of petitioner, and would be res judicata upon appeal and not subject to review by certiorari by this Court because not timely taken from the present judgment against petitioner on this issue and involving his rights under the Constitution.

The main ground of petitioner's appeal to said District Court of Appeal of California was lack of probable cause and illegality of his arrest and of said search of his person.

Subsequent to the filing of said opinion and judgment on April 29, 1965, a petition for hearing by the Supreme Court of the State of California was duly and regularly filed by the People of the State of California and petitioner herein, upon filing a reply thereto, set forth his contention that hearing should be granted and that said opinion and judgment of the District Court of Appeal should be reversed upon the ground said arrest and search contravened his constitutional privileges and immunities.

The petition for hearing by the Supreme Court of the State of California was denied on June 23, 1965 without opinion.

BASIS FOR JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States has jurisdiction as to this matter upon the petition for writ of certiorari by virtue of the provisions of Section 1257, Title 28, United States Code, as amended, in that said defendant specially set up and claimed his rights and privileges and immunity under the Constitution of the United States, Amendment 4, as aforesaid.

Said petitioner contended throughout the proceedings by the Courts of the State of California that said arrest and said search were in violation of the rights guaranteed to said defendant by said 4th Amendment of the Constitution of the United States in that said arrest and search were made without warrant and against his will and without any reasonable, probable or any cause, as were the seizure of said evidence from the person of said defendant.

QUESTIONS PRESENTED

The review sought herein presents the following questions:

Whether a person can be stopped, arrested, interrogated and searched at night upon private premises against his will and without his consent, without warrant or information from a reliable informant that said person has been or is engaged in criminal activity, and whether narcotics found upon his person as a result of such search can be used as the basis for his conviction of possession thereof.

Whether such search and arrest and use of such evidence so seized under such circumstances is in contravention of Amendments 4, 5, and 14 of the United States Constitution as unreasonable, without probable cause, and not incidental to a lawful arrest.

HOW THE FEDERAL QUESTION AROSE

On April 9, 1963 an information was filed in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "People of the State of California, Plaintiff, vs. Peter Machel, Defendant," and numbered 61583, whereby defendant Peter Machel (petitioner herein) was accused by the District Attorney of the City and County of San Francisco, State of California, of violation of § 11530 of the Health and Safety Code of the State of California, in that defendant was charged with having unlawfully in his possession on the 7th day of March, 1963, in the City and County of San Francisco, State of California, a narcotic, to wit, marijuana. (Cl. Tr. 1-2.)*

Defendant Machel was arraigned on April 29, 1963 and at said time interposed motion to dismiss said information under the provisions of Section 995 of the Penal Code of the State of California upon the ground that before the filing of said information, defendant had not been legally committed by a magistrate and that defendant had been committed without reasonable or probable cause. (Cl. Tr. 3-4.)

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*Abreviations: Cl. Tr. relates to Clerk's Transcript; R. Tr. relates to Reporter's Transcript.

Said motion to dismiss was based upon the rights of defendant guaranteed by the 4th Amendment of the United States Constitution and by Article I, § 19 of the Constitution of the State of California, in that there was no reasonable cause to make an arrest and that evidence seized from the person of said defendant was seized as a result of unlawful and illegal search and without reasonable or probable cause, all in violation of said provisions of the United States Constitution. (Cl. Tr. 9-16.)

Said motion to dismiss said information was denied on the 13th day of May, 1963. (Cl. Tr. 4.)

Thereafter said matter was tried before the Superior Court of the State of California and on or about October 2, 1963 said defendant was by the Superior Court found guilty of the crime of felony, to wit, possession of marijuana. (Cl. Tr. 4-6.)

Thereafter on December 16, 1963 said Superior Court of the State of California, in and for the City and County of San Francisco, entered judgment that said defendant be punished by imprisonment in a state prison for the term prescribed by law (Cl. Tr. 2-8.)

Thereafter said defendant appealed (Cl. Tr. 18) and on said appeal defendant asserted that the rights guaranteed to him under the Constitution of the United States, Amendment 4 thereof, had been disregarded and violated in that said search of his person occurred without probable cause to arrest said defendant and that his arrest was illegal and that there was an illegal search of his person and illegal seizure

of evidence from his person, because without reasonable or probable cause and not incidental to lawful arrest, which evidence, to wit, marijuana cigarettes, was introduced in evidence against him at his trial.

April 29, 1965 the District Court of the State of California, by opinion and judgment, determined the arrest, search, and seizure were lawful and the marijuana cigarettes seized admissible in evidence. (See Appendix A.)

Thereafter the respondent sought a hearing by the Supreme Court and appellant asserted the new trial should be granted on the ground his constitutional rights had been violated as particularized before.

June 23, 1965 the Supreme Court of California made its order denying a hearing. (See Appendix B.)

FACTUAL STATEMENT

The basis of said charge was as follows:

On March 7, 1963, around 8:30 or 8:45 P.M., because of information received which in no way related to the petitioner Machel (R. Tr. 16), Officer Martin and others went to an apartment house at 1190 Pine Street to an apartment occupied by Nadine Sweem and Lewis Molin.

The officers arrested these two, because one marijuana cigarette butt was found in the apartment, and charged them with possession of marijuana. (R. Tr. 2-3; 78; 76.)

Until this arrest, the officers had had no previous contact with Nadine Sweem. (R. Tr. 60.)

After the arrest, upon interrogation, Nadine Sweem stated to the officers that "Pete" had left the cigarette there the night before and was expected at the apartment around nine o'clock that night; nothing was said as to the purpose of said visit. (R. Tr. 21-22; 59-60.)

From her description and this nickname, Officer Martin concluded the person she referred to was Peter Machel, the petitioner here. (R. Tr. 5-6.)

Two months before, Officer Martin had arrested a woman named Max Phelps in the Mission District of San Francisco. With her consent, he monitored one of her phone calls after her arrest. She identified the person speaking on the other end of the phone as a Pete Machel.

Officer Martin had no recollection of any part of the conversation, but testified that while there was no reference to narcotics, the conversation led him to *suspect* that the person *might* be involved in narcotic activity.

Before the arrest of Max Phelps the officer had no contact with her. She said nothing involving Machel in narcotics. (R. Tr. 16-30; 18-20.)

Officer Martin did nothing further in relation to Peter Machel, except that some indefinite time later, but within a month of the Phelps arrest, upon checking police records, he found a Pete Machel had a narcotics conviction *ten years before.* (R. Tr. 19-20.)

See *People v. Privett,* 55 C.2d 698, 702, where consideration is given to the significance of this type of information.

See also *People v. Haven,* 59 C.2d 713, 717.

The officers waited at the Sweem-Molin apartment for a short time after arresting them.

The evidence later disclosed that Peter Machel had helped Molin move Nadine Sweem into Molin's apartment the day before the arrest and had borrowed Molin's car and came there the night of his arrest to return the car. (R. Tr. 59-60.)

Around 9:20 P.M. the street door buzzer of the apartment house rang and the officers responded from the Sweem-Molin apartment by releasing the catch on this outer door.

When the bell to the Sweem-Molin apartment rang, the officers opened the door of this apartment and found Machel and one Russo standing in the hall. (R. Tr. 7-9; 23-25; 71.)

Russo was known to Officer Martin as a narcotic offender. There was no evidence Machel had ever been seen with Russo before or had any other connection with him.

According to the prosecution, Machel turned pale, started to perspire, and took three or four very slow, short steps—three or four feet—backwards from the door. (R. Tr. 8; 71; 43-44.) At that time, outside the door of the apartment, according to the officer, Machel would not have been permitted to leave the apartment house. (R. Tr. 41.) Niblo, an agent of the United

States Treasury Department, Bureau of Narcotics, put his arm on Machel because he thought he was about to flee. (See *Wong Sun v. U.S.*, 371 U.S. 471.)

See *People v. Gibson*, 220 A.C.A. 15, 21, for discussion of when an arrest occurs.

After bringing Machel into the apartment, Officer Martin made a "pat" search looking for signs of weapons or *contraband* and determined Machel was unarmed. (R. Tr. 10.)

Martin testified he felt some objects in Machel's pants pockets and concluded that one of the objects he felt *might* be marijuana cigarettes. In Officer Martin's words:

> "I felt an article or articles in his pocket, which, from my past experience, made me *suspicious* that they were *perhaps* marijuana cigarettes." (R. Tr. 15-17; 10; 42-43.) (Emphasis ours.)

Officer Martin asked Machel several times what he had in his pockets. Machel did not reply or make any motion toward the pockets. (R. Tr. 11-12; 46-47; 77-78.)

The officer thereupon reached into the pocket and pulled out the object he had felt—three cigarettes bound with a rubber band. (R. Tr. 11-12.) Upon later examination by a toxicologist it was determined that one or more of these cigarettes contained marijuana. Whether all contained marijuana was uncertain.

Machel, in response to questions thereafter asked whether Martin couldn't give him a break and told

him that he got the cigarettes a few days before from a man named Rudy and these were the three remaining out of eight. Later Machel said he got them from a woman named Sylvia on Bush Street. (R. Tr. 13.)

Machel testified:

He was employed by Bauer-Schweitzer Malting Company as a brewer for eight years. His family consisted of a wife, and boy, and daughter. He had two children by a previous marriage. (R. Tr. 83, 84.)

The night before the arrest on March 7, 1963, he had helped Lewis Molin move furniture for Nadine Sweem and Molin loaned Machel his car. The evening of March 7th he came by to give him back the car and the keys. (R. Tr. 84.)

There was a buzz which released the outside door of the apartment house. Then he rang the 101 buzzer and two men came out whom he didn't know and said they were police officers, and Niblo (the Federal Agent) put an armlock on him and Martin put the handcuffs on him. (R. Tr. 85.)

They put them inside the room—Machel and Russo. (R. Tr. 85.)

Machel knew a woman named Max Phelps and had for a couple of years and in January knew she was arrested. (R. Tr. 85.)

He had called her on one occasion and had a short conversation of hello-goodbye because she was busy, and later on she said she was arrested and that was the reason she couldn't talk on the phone. (R. Tr. 86.)

Under Cross-examination:

Machel admitted he had been convicted of a felony. He was asked whether that was for furnishing marijuana to minors and the objection was overruled, and then answered "yes." (R. Tr. 86-87.)

He said he was at the apartment on March 6, 1963. On March 7, 1963 he arrived at about 9:20 with Russo who works at the brewery with him and whom he had known for two or three years. He was searched by Officer Martin. He was asked whether he had three marijuana cigarettes on his person, and after objection that the answer might incriminate him, which was overruled, answered "yes." (R. Tr. 90.)

Molin testified as follows:

He knew Machel and the arrest took place on March 7, 1963 at Molin's apartment. (R. Tr. 81.)

Martin and Niblo went around the back of Pete Machel outside the doorway to the apartment and handcuffed him and brought him into the apartment. (R. Tr. 82.)

Under cross-examination:

The day before Machel had helped move some of Nadine Sweem's things into the apartment. (R. Tr. 82.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The opinion and judgment of the District Court of Appeal of the State of California, as to which hearing was denied by the Supreme Court of the State of California, will be asserted by the People of the State of California as constituting the law of the case upon retrial of the defendant, which retrial has been demanded by the People of the State of California and is presently pending.

On retrial the determination that said arrest, search, and seizure were legal and did not contravene the 4th Amendment will be the law of the case and said cigarettes will be admitted into evidence against petitioner.

In the event of conviction of said defendant upon said retrial it will be contended that said opinion and judgment of the District Court of Appeal as to the validity of said search, seizure, and arrest, is final and res judicata and that no appeal can lie therefrom to the appellate courts of the State of California as to said issues and that time for petition for review by this Honorable Court expired 90 days after said Supreme Court of the State of California refused to review the opinion and judgment of the District Court of Appeal above referred to.

Where, as here, a challenge is made to police action undertaken indoors as part of a criminal investigation, the basic question to be determined is whether said action is a violation of the federal constitutional standards of reasonableness prescribed by

the 4th Amendment. (See *Ker v. California,* 374 U.S. 23 at 34.)

CALIFORNIA COURTS ARE IN CONFLICT

The Courts of the State of California are in conflict in their opinions regarding factual issues similar to those in the case at bar in relation to constitutional privileges and immunities accorded by Amendment 4 of the Constitution of the United States.

This is not a case of an interrogation of an individual upon the streets at any unusual hour or at night.

In fact, the evidence establishes there was no interrogation as to name (the officer said he recognized petitioner), as to occupation, as to residence, as to any activity connected with those already arrested, or the apartment house where petitioner was arrested and searched. The only question was as to the nature of the contents of his pocket.

In *People v. Harvey,* 142 C.A.2d 728 [3], the following appears:

> "Searches and Seizures — Justification for. — Though police officers have the right to interrogate a man found on a street at night, defendant's conduct in backing away and refusing to take his hands from his pockets did not constitute suspicious conduct which justified the officers in seizing and searching him where, at the time they approached him and requested him to remove his hands from his pockets, they had already determined to arrest him and had no intention of interrogating him."

The People and the District Court of Appeal contend that Machel's nervousness when confronted by Officer Martin in the apartment house was a factor establishing probable cause for his arrest and search.

In *Gascon v. Superior Court,* 169 C.A.2d 356, the defendant on questioning appeared nervous. When told the officer was going to search him, he fled and threw away marijuana.

The Court held there was no probable cause to make an arrest and so no valid search.

The People and the District Court of Appeal also rely upon the fact that Machel (petitioner) was in the company of Russo, known to the police officers as a narcotic offender, to establish probable cause.

People v. Shelton, 60 C.2d 740, held specifically:

> ". . . association between a suspect and even a known criminal is not, by itself, reasonable cause for an arrest and search." [4]

This case also held that:

> "The right to seek interviews with suspects does not justify an officer intruding himself into a home without consent, either physically or by a view of the interior made possible only by a wrongful assertion of authority." [11]

It would seem axiomatic that this rule would be more rigidly applied to an officer intruding his hand into the pocket of the defendant because he ". . . felt an article or articles in his pocket, which, from my experience, made me *suspicious* that they were *perhaps* marijuana cigarettes." (R. Tr. 10, lines 15-17.)

Note: The suspicions were aroused in the course of an external patting of petitioner's pants.

The decision of the District Court of Appeal sustaining the legality of the search is in conflict with the decisions of California courts in the following cases:

In *People v. Martines,* 228 C.A.2d 245, the Court said regarding marijuana found in defendant's pocket:

> "Conceding that the officers had a right to stop appellant and make a cursory search (*Hilliard,* supra,) there is nothing in the evidence which has been detailed in full which warranted the police officer who ran his hands over appellant's left pants pocket and felt an object that felt like a knife, in making a further search. There is no evidence of any kind from which it can be deduced that there was any reason for either of the officers to fear for the safety of their persons. Officer Germann's testimony that 'due to the darkness in the alley and for my own safety . . .' led him to make the cursory search, is evidence of his own state of mind. In the circumstances a cursory search was warranted. Nothing was revealed by the cursory search which warranted the officer in emptying appellant's pocket as he did. As stated by the Court in *People v. Simon,* 45 Cal.2d at page 650:
>
> " 'Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be so justified. . .'

"In the case at bar it seems that the cursory search made should have reassured the officer rather than have alarmed him.

"In *Reeves, Mickelson* and *Simon* (supra) searches were made on facts and under circumstances more suspicious, and in each of said cases the searches were held to have been illegally made.

"The judgment is reversed." (pp. 247-248)

People v. Ross, 223 C.A.2d 196, syllabi contain the following:

"[1a, 1b] Searches and Seizures — Probable Cause.—After officers investigated the robbery of a paint store and satisfied themselves that defendant and two men who were with him carried no dangerous weapons, their subsequent search of defendant's pockets was purely exploratory, was not based on probable cause to arrest, the product of such subsequent search (marijuana cigarettes) was inadmissible in evidence, and defendant's conviction based on that evidence cannot stand.

"[2] Id.—Probable Cause.—Assuming that there was reasonable cause to arrest and search two men in sweaters who were with defendant and who fit the description of robbery suspects, this alone would not justify arresting or searching defendant, a third party found in their company."

People v. Simon, 45 C.2d 645, syllabi contain the following:

"[1] Searches and Seizures—Justification for.—A search incident to an arrest cannot be justified

in the absence of 'reasonable cause' under Pen. Code, §836, merely because it reveals that defendant is in fact guilty of a felony.

"[2a, 2b] Id.—Justification for—The search of defendant's person at night may be justified only if he was committing or attempting to commit an offense in the officer's presence (Pen. Code, §836,Subd.1), or if the officer had reasonable cause to believe he had committed a felony. (Pen. Code, §836,Subd.5.)

"[7] Arrest—Without Warrant.—There is nothing unreasonable in an officer's questioning persons outdoors at night, and it is possible that in some circumstances even a refusal to answer would in the light of other evidence, justify an arrest.

"[8] Searches and Seizures—Justification for.—Where an officer first searched defendant and asked questions only after his search uncovered an incriminating marijuana cigarette, and where there is nothing to indicate that had he confined himself to a reasonable inquiry he would have discovered anything to confirm his suspicion that defendant had no lawful right to be where he was, the search may not be justified on the ground that the officer 'didn't feel' that such person had any lawful business there at night."

It should be borne in mind that in the case at bar the only questions asked before the officer intruded his hands into the defendant's pockets were:

"A. Oh, I asked him three or four times what he had in his pocket.

Q. And did he say anything?

A. And he refused to make any statement whatsoever."

(See R. Tr. 11, lines 10 to 23.)

See also the following pertinent California cases:

People v. Di Blasi, 228 C.A.2d 338;
People v. Mickelson, 59 C.2d 448;
People v. Gallagos, 62 A.C. 177;
People v. Reeves, 61 C. 268;
People v. Perez, 219 C.A.2d 760.

THE OPINION AND JUDGMENT OF THE DISTRICT COURT OF APPEAL HEREIN IS IN CONFLICT WITH FEDERAL INTERPRETATIONS

The District Court of Appeal's opinion and judgment justify the arrest and search and use as evidence of three cigarettes found in petitioner's pocket in the following excerpt from the opinion:

"What information did Inspector Martin have at the time of arrest? As already stated, he had been told by Nadine Sweem that the marijuana cigarette had been left in the apartment on the preceding evening by a person who, as we have explained, Martin concluded to be defendant. While Nadine Sweem was an unreliable informer and her information of itself did not constitute probable cause for arrest (Willson v. Superior Court (1956) 46 Cal.2d 291, 294; People v. Cedeno, supra, 218 Cal.App.2d 213, 219; People v. Burke, supra, 208 Cal.App.2d 149, 156; People v. Goodo (1956) 147 Cal.App.2d 7, 9) it was nevertheless relevant on the issue of probable cause (Willson v. Superior Court, supra.) Martin had

also learned from police records that defendant had a narcotics record and had observed defendant on the night in question in the company of a person then under indictment for narcotic offenses. While these circumstances either singly or together did not of themselves constitute probable cause for arrest they were relevant on the issue of probable cause. (People v. Reeves (1964) 61 Cal.2d 268, 274; People v. Privett, supra, 55 Cal.2d 698, 702; People v. Sanders (1956) 46 Cal.2d 247, 251.) Furthermore, when first confronted by defendant, Martin observed him become very pale and start to retreat to the main door of the building. This too was relevant although it may not have been furtive or suspicious conduct sufficiently corroborative of other information possessed by the inspector so as to constitute probable cause. (See People v. Cedeno, supra, 218 Cal.App.2d 213, 224-226.)

"The subsequent developments however are highly significant. In the course of the 'pat' search, the inspector felt articles in defendant's pocket which *from his past experience* made him suspicious that they were perhaps marijuana cigarettes. As set forth previously, Martin explained his past knowledge as to how marijuana cigarettes are carried. The inspector then asked defendant what was in his pocket whereupon the latter 'began to sweat very profusely and he remained very pale.' We are satisfied that these developments taken together with the other information previously acquired by Martin gave him reasonable cause to believe that defendant had marijuana cigarettes in his pocket and was then committing a felony."

234 Advance Cal. Appellate at page 49.

Before proceeding, we propound this question:

Assuming

(1) the officer had been told by Nadine Sweem, an unreliable informer, while under arrest for the possession of the partly smoked marijuana cigarette found in her and Molin's apartment, that Pete had left it there the night before and the officer concluded Pete was the defendant;

(2) Martin knew from police records defendant had been convicted for sale of marijuana 10 years before;

(3) the defendant appeared at the apartment door in the company of Russo, then under indictment for a narcotic offense;

(4) defendant became pale and started to retreat;

(5) in the course of a pat search (meaning external patting the clothing with the hands) the inspector felt articles inside defendant's pockets which from his past experience made him *suspicious* they were *perhaps* marijuana cigarettes; and

(6) when asked what was in his pocket defendant began to sweat profusely and remained pale.

At that time was there probable cause to arrest defendant upon any charge?

If the articles, upon being taken from the pocket had turned out to be Lucky Strikes, would the arrest have been valid?

The answers to these questions must be "no" and demonstrate that the validity of the arrest and the

search of defendant depended upon what was turned up in the search, to wit, three marijuana cigarettes. If there had been no marijuana cigarettes found, petitioner would never have been charged.

> "Belief that article sought is concealed in a dwelling house furnishes no justification for a search without a warrant, and such searches are unlawful notwithstanding facts unquestionably showing probable cause." *Chapman v. U.S.*, 365 U.S. 610.
>
> "The government may not justify an arrest by the search and at the same time justify the search by the arrest." *U.S. v. Elliott,* 210 F. Supp. 357.
>
> "Defendant, allegedly a known felon, was under unlawful arrest when he answered officers' call to come out of a restaurant although he had been committing no offense, not even loitering, and evidence then produced on demand that he reveal the content of pocket was unlawfully seized." *Kelley v. U.S.* 1961, 298 F.2d 310.

See also: Opinions of the U.S. Court heretofore cited and

Fahey v. Conn., 375 U.S. 85;
Beck v. Ohio, ... U.S. ....., 13 Law Ed.2d 142;
Mapp v. Ohio, 367 U.S. 643;
Stoner v. California, 376 U.S. 483;
Ker v. California, 374 U.S. 23.

Cases of other States are likewise in conflict with the present judgment.

In *State v. Doyle,* N.J. 1964, 200 A.2d 606, it was held:

> ". . . the restraint of persons of defendants and restriction of their liberty of movement by police officers almost immediately upon entry into defendants' apartment constituted an arrest, in determining lawfulness of seizure of articles in defendants' apartment following such arrest."

Likewise it was held in *State v. Scanlon,* N.J., 202 A.2d 448 that:

> "Suspicion does not rise to level of probable cause and is insufficient ground on which to base search and seizure without warrant."

Thus we find the opinion and judgment in the instant case in conflict with the interpretation of the 4th Amendment of the Constitution of the United States by the federal courts and other state courts and by the courts of California.

An important question to be determined in the case at bar is whether police officers who have arrested an occupant of an apartment for possession of marijuana, and said occupant states the marijuana cigarette was left there the night before by another party who is expected to appear sometime later, the officers can lie in wait until the petitioner's appearance and then pat him down ". . . for any signs of weapons, *contraband that we might find mostly,* usually weapons" (testimony of Officer Martin, R. Tr. 10, line 8), and upon feeling an object in Machel's pocket which he *suspects might be* marijuana cigarettes, search and arrest and charge with a criminal offense based on what was found in Machel's pocket.

It is basic that there was no duty on Machel's part to cooperate with the officer. There was no duty upon Machel to answer the interrogation as to the contents of his pocket; as heretofore pointed out, there was no interrogation as to the identity, residence, occupation, association with those theretofore arrested for possession of the partly smoked cigarette found in the apartment an hour before, or any activity of Machel's prior to the demand that he tell what he had in his pocket, and insofar as the arrest and search is concerned, all interrogation was strictly limited to the repetitious question "what do you have in your pocket."

If an arrest and search and use of evidence turned up can be validated on the tenuous grounds advanced, then the protection of the 4th Amendment is flimsy indeed.

Moreover, the very pat down that is relied upon was instituted ". . . for any signs of . . . contraband that we might find mostly. . ." (R. Tr. 10, lines 8-9.)

This was done at a time when the officer had no reliable information from any source that Machel was engaged in any illicit activity of any kind, yet the opinion and judgment of the District Court of Appeal as to which review is sought determines as the law of the case that the officer had reasonable cause to believe that a felony was being committed in his presence.

Moreover, the petitioner herein should be protected from the expense and inconvenience and hazard in-

cidental to a retrial, and in the event of conviction, a series of appeals directly dependent upon the determination of the lawfulness of the arrest and seizure and use of evidence acquired thereby, particularly when it is obvious that if there were such a sequence of events, and relief from this Court were sought by petition for certiorari, the defense would be raised that no timely petition for certiorari was filed seeking review of the opinion and judgment of the District Court of the State of California and the refusal of the Supreme Court of the State of California to hear the case prior to the trial now pending.

Wherefore, for the reasons discussed above, it is respectfully submitted that certiorari should issue to review the decision of the Court below.

Dated, San Francisco, California,
July 19, 1965.

JAMES C. PURCELL,
Attorney for Petitioner.

(Appendices A and B Follow)

Appendix A

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Criminal No. 4539

People of the State of California,
Plaintiff and Respondent,
vs.
Peter Machel,
Defendant and Appellant.

OPINION

The court sitting without a jury found defendant guilty of possession of marijuana. (Health & Saf. Code, § 11530.)[1] He appeals from the judgment of conviction. On March 7, 1963, at about 8:30 p.m., San Francisco Police Inspector Robert Martin, a member

[1]A second count of the information charging defendant with transportation of marijuana (Health & Saf. Code, § 11531) was dismissed by the court prior to trial upon the motion of the district attorney. After appropriate proceedings conducted upon defendant's conviction, the court found defendant not to be a narcotic addict within the meaning of Penal Code section 6451 and thereupon sentenced him to prison for the term prescribed by law.

of the narcotics detail, accompanied by Inspector Lawler of that detail and Federal Agent Niblo went to apartment 101 at 1190 Pine Street, San Francisco, on a narcotics investigation. There Martin arrested Lewis Molin and Nadine Sweem, the occupants of the apartment, for possession of a marijuana cigarette. Nadine Sweem told Inspector Martin that they had obtained the cigarette from "a person by the name of Pete" who had left it there the night before. She said that Pete was expected to return that night at about 9 p.m. although she did not indicate the purpose of his visit.

After further discussing this person with Nadine Sweem, Martin reached the conclusion that he was defendant Peter Machel concerning whom he had certain information. Martin knew Machel to be an associate of a woman named Max Phelps whom Martin and Lawler had arrested for possession of marijuana in January 1963. On that occasion Martin with the permission of Max Phelps had monitored an incoming telephone call from a person identified by her as defendant. While the caller made no mention of narcotics, the gist of the conversation and the "jargon" employed made Martin suspicious that he might be involved in the narcotics traffic. Max Phelps had said only that defendant was a friend of hers and mentioned nothing about defendant's activity in narcotics. Prior to this occasion, the inspector had had no contact with Max Phelps. However, he later checked the police records and found that defendant had been arrested in the past and that he had a narcotics rec-

ord. He also saw defendant's photograph in his "rap sheet." Martin stated that the foregoing was the only information he had concerning defendant when on March 7, 1963, he went to the apartment house on Pine Street.

After arresting the occupants, the three officers remained in the apartment. At 9:20 p.m. the door bell rang and someone pressed the return buzzer. Martin and Niblo stationed themselves just inside the front door of the apartment. There was a knock on the door and upon opening it Martin observed defendant and one Joe Russo standing at the door. The inspector had arrested Russo some months before and knew that he was then under indictment for possession and transportation of marijuana. He recognized defendant from his "mug shots."

The inspector greeted Russo and identified himself to defendant, who became very pale and started backing up toward the general direction of the main door of the apartment house. After defendant had taken several backward steps, Martin "then walked up to him and placed my arm on him and stopped his backward progress." Martin and Niblo then "escorted Russo and Machel back into the apartment." Up to this point defendant had said nothing.

Defendant was taken into the bedroom where Martin "patted him down" for weapons. As the inspector ran his hands over defendant's left front trouser pocket, he "felt on article or articles in his pocket which, from my past experience, made me suspicious

that they were perhaps marijuana cigarettes. . . . Usually, if several cigarettes are carried, they are as a rule bound by a rubberband or some type of article like that to keep them from bouncing around in the pocket and perhaps become damaged, also to facilitate a quick disposal of them." Martin thereupon asked defendant what he had in the pocket whereupon defendant "began to sweat very profusely and he remained very pale." He repeated the question three or four times but defendant refused to talk. Martin then put his hand in the pocket and removed the object he had felt, which appeared to be three marijuana cigarettes bound with a rubberband. Martin did not feel any weapons on defendant when he conducted the pat search. He could not recall at the trial whether or not defendant was handcuffed at this time. The inspector then interrogated defendant as to where he obtained the cigarettes, a matter which we discuss in detail *infra*. At the trial the cigarettes were introduced in evidence over defendant's objections that they were the product of an unlawful search and seizure.

Inspector Martin testified under cross-examination that his original purpose in going to the Pine Street apartment on a narcotics investigation did not contemplate an investigation of defendant. He also stated that if defendant had wanted to leave the apartment house premises when Martin first saw him standing at the door, he would not have permitted defendant to do so.

Defendant called Federal Narcotics Agent Niblo as his own witness. Niblo testified that when the apart-

ment door was first opened defendant was apparently "a little shocked by our presence there" and took one step backward whereupon "I think, I put my arm . . . on his right arm because I was under the impression he was about to flee. . . ." According to Niblo, defendant was not handcuffed outside the door but only after Martin had removed the cigarettes from his pocket inside the apartment.

Lewis Molin, one of the occupants of the apartment, also called as a witness for defendant, testified that when defendant first appeared at the apartment, Martin and Niblo showed him their badge and Niblo, going behind defendant, held the latter's arms in an armlock while Martin handcuffed him and brought him into the apartment.

Defendant, testifying in his own behalf, stated that he had gone to the apartment to return Molin's car which he had borrowed. His description of the arrest coincided with that of Molin. Defendant admitted knowing Max Phelps, mentioned by Inspector Martin in connection with the January episode, admitted telephoning her at about that time and further admitted on cross-examination that at the time of the arrest he had the three marijuana cigarettes on his person.

Defendant contends on appeal (1) that the search of his person not being incidental to a lawful arrest upon probable cause was illegal and that the evidence illegally seized in the course thereof should have been excluded by the trial court; and (2) that the admission in evidence of incriminating statements made by him was reversible error under the rule

announced in *People v. Dorado* (1965) *62 Cal.2d ..... [42 Cal.Rptr. 169, 398 P.2d 361]. It is the position of the Attorney General that the circumstances initially confronting the officers, though possibly short of probable cause for defendant's arrest, nevertheless warranted his temporary detention for questioning which thereupon revealed probable cause for an arrest and search. The Attorney General asserts that the rule of temporary detention for questioning as reaffirmed in *People v. Mickelson* (1963) 59 Cal.2d 448 [30 Cal.Rptr. 18, 380 P.2d 658] is here applicable. Defendant disputes this on the grounds that the detention in the instant case did not occur outdoors.

In California the rule is settled "that circumstances short of probable cause to make an arrest may still justify an officer's stopping pedestrians or motorists on the streets for questioning. If the circumstances warrant it, he may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons. Should the investigation then reveal probable cause to make an arrest, the officer may arrest the the suspect and conduct a reasonable incidental search. [Citations.] (*People v. Mickelson, supra,* 59 Cal.2d 448, 450-451; *People v. Lopez* (1963) 60 Cal.2d 223, 241 [32 Cal. Rptr. 424, 384 P.2d 16]; *People v. One 1960 Cadillac Coupe* (1964) †62 Cal.2d ....., ... [41 Cal.Rptr. 290, 396 P.2d 706].) The above Cali-

*Advance Report Citation: 62 A.C. 350.

†Advance Report Citation: 62 A.C. 89, 93.

fornia rule permitting temporary detention for questioning "strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement. It wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified." (*People v. Mickelson, supra,* 59 Cal.2d at p. 452.) While it is operative under circumstances short of probable cause to make an arrest (*People v. Mickelson, supra*) "nevertheless there must exist *some* suspicious or unusual circumstance to authorize even this limited invasion of a citizen's privacy." (*Hood v. Superior Court* (1963) 220 Cal.App.2d 242, 245 [33 Cal.Rptr. 782]; *People v. Cowman* (1963) 223 Cal.App.2d 109, 116 [35 Cal.Rptr. 528].)

However the above rule by its terms and in its application has been confined to persons outdoors as appears from the facts of *Mickelson* and the supporting authorities therein referred to[2] as well as from a number of decisions both preceding[3] and fol-

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[2]*People v. Mickelson, supra,* 59 Cal.2d 448 (motorist at night); *People v. Blodgett* (1956) 46 Cal.2d 114 [293 P.2d 57] (occupants of taxicab at night); *People v. Martin* (1956) 46 Cal.2d 106 [293 P.2d 52] (occupants of parked car at night); *People v. Simon* (1955) 45 Cal.2d 645 [290 P.2d 531] (pedestrians outdoors at night); *People v. Beverly* (1962) 200 Cal.App.2d 119 [19 Cal. Rptr. 67] (motorists at night); *People v. Anushevitz* (1960) 183 Cal.App.2d 752 [6 Cal.Rptr. 785] (motorist—time of day not indicated); *People v. King* (1959) 175 Cal.App.2d 386 [346 P.2d 235] (motorist at 1 p.m.).

[3]*People v. Mosco* (1963) 214 Cal.App.2d 581 [29 Cal.Rptr. 644] (occupant of illegally parked car at night); *People v. Alcala* (1962) 204 Cal.App.2d 15 [22 Cal.Rptr. 31] (motorists at night); *People*

lowing[4] *Mickelson*. In most instances the detention has occurred *outdoors* at *night*. Obviously temporary detention by the police *indoors* for investigation purposes is cast in a different setting and may require assessment of additional factual ingredients. The subject of the investigation may be a licensee or invitee lawfully on the premises or may be a person in his own dwelling place. (See *People v. Cove* (1964)

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v. Anguiano (1961) 198 Cal.App.2d 426 [18 Cal.Rptr. 132] (motorist at night); *People v. Nichols* (1961) 196 Cal.App.2d 223 [16 Cal.Rptr. 328] (motorist at 4 a.m.); *People v. Ellsworth* (1961) 190 Cal.App.2d 844 [12 Cal.Rptr. 433] (occupant of parked car at night); *People v. Murphy* (1959) 173 Cal.App.2d 367 [343 P.2d 273] (occupants of parked car at 1:30 a.m.); *People v. Jiminez* (1956) 143 Cal.App.2d 671 [300 P.2d 68] (motorists at night).

[4]*People v. One 1960 Cadillac Coupe, supra,* [c]62 Cal.2d ..... (motorist in daytime); *People v. Lopez, supra,* 60 Cal.2d 223 (motorists in early hours of morning); *People v. Currier* (1965) [d]232 Cal.App.2d ..... [42 Cal.Rptr. 562] (pedestrian on streets at night); *People v. Martinez* (1964) [e]228 Cal.App.2d 739 [39 Cal. Rptr. 839] (motorist at 4 p.m.); *People v. Martinez* (1964) [b]228 Cal.App.2d 245 [39 Cal.Rptr. 526] (pedestrian on streets at night); *People v. McGlory* (1964) 226 Cal.App.2d 762 [38 Cal. Rptr. 373] (occupants of parked car in early morning); *People v. Randal* (1964) 226 Cal.App.2d 105 [37 Cal.Rptr. 809] (motorist at night); *People v. Ruhman* (1964) 224 Cal.App.2d 284 [36 Cal. Rptr. 493] (motorist at night); *People v. Cowman, supra,* 223 Cal. App.2d 109 (motorist at night); *People v. Lovio* (1963) 222 Cal. App.2d 79 [34 Cal.Rptr. 747] (occupant of parked car at night); *People v. Davis* (1963) 222 Cal.App.2d 75 [34 Cal.Rptr. 796] (motorist at night); *People v. Koelzer* (1963) 222 Cal.App.2d 20 [34 Cal.Rptr. 718] (pedestrian outdoors at night); *People v. Hilliard* (1963) 221 Cal.App.2d 719 [34 Cal.Rptr. 809] (pedestrian outdoors at night); *Hood v. Superior Court, supra,* 220 Cal.App.2d 242 (motorist at night); *People v. Williams* (1963) 220 Cal.App. 2d 108 [33 Cal.Rptr. 765] (pedestrian outdoors at night); *People v. Gibson* (1963) 220 Cal.App.2d 15 [33 Cal.Rptr. 775] (motorist at night); *People v. Pearsall* (1963) 216 Cal.App.2d 196 [30 Cal. Rptr. 777] (occupant asleep in parked car at night).

[c]Advance Report Citation: 62 A.C. 89.

[d]Advance Report Citation: 232 A.C.A. 152.

[e]Advance Report Citation: 228 A.C.A. 836.

[b]Advance Report Citation: 228 A.C.A. 280.

[a]228 Cal.App.2d 466 [39 Cal.Rptr. 535].) As the court observed in *Cove*: "Constitutional alertness to possible police invasion of privacy is seemingly sharpened when the area of search is a home or apartment rather than an automobile or a pedestrian abroad on the midnight streets. (*Ker v. California*, 374 U.S. 23 [83 S.Ct. 1623, 10 L.Ed.2d 726]; *People v. Shelton*, 60 Cal.2d 740 [36 Cal.Rptr. 433, 388 P.2d 665].)" ([b]P. 469.)

Nevertheless reasonable investigatory techniques may be pursued by the police indoors as well as outdoors. "[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes." (*People v. Michael* (1955) 45 Cal.2d 751, 754 [290 P.2d 852]; *People v. Martin* (1955) 45 Cal.2d 755, 761 [290 P.2d 855]; *People v. Burke* (1962) 208 Cal.App.2d 149, 161 [24 Cal. Rptr. 912].) Generally speaking a police officer may detain and question a person when the circumstances are such as would indicate to a reasonable man in a like position that such a course is necessary to the proper discharge of his duties. (*People v. One 1960 Cadillac Coupe, supra*, [c]62 Cal. 2d ....., ...) Where as here a challenge is made to such police action undertaken indoors as a part of effective criminal investigation, the basic question to be determined is whether such action is violative of federal constitutional standards of reasonableness

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[a]Advance Report Citation: 228 A.C.A. 535.
[b]Advance Report Citation: 228 A.C.A., at p. 469.
[c]Advance Report Citation: 62 A.C. 89, 93.

prescribed by the Fourth Amendment. (*Ker v. California* (1963) 374 U.S. 23, 34 [83 S.Ct. 1623, 10 L. Ed.2d 726, 738].)[5] Thus in *People v. Cove, supra,* †228 Cal.App.2d 466, two police officers, Lyons and French, went to defendant's apartment in response to a complaint by another tenant that defendant was causing a disturbance with a gun, one officer knocking at the front door and the other officer going to the rear. French observed through a rear window the defendant answering the front door gun in hand and then having a friend secrete the gun under a sofa cushion. In the meantime Lyons was questioning defendant at the front door, which was open under circumstances construed by the court as an invitation to him to enter. French immediately went around to the front door, entered while it was still open to admit Lyons and removed the gun from its hiding place. Measuring this conduct against Fourth Amendment standards of reasonableness, the court upheld this self-protective seizure of the weapon made incidental to the investigation stating: "Under the circumstances which the police faced here, the realities, the demands of police obligation and self-pro-

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[5]In *Ker, supra,* after stating that in cases involving federal constitutional rights state court findings are by no means insulated against examination by the Supreme Court for the purpose of determining whether federal criteria as to reasonableness have been respected, the court said: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . ." (374 U.S. at p. 34.)

†Advance Report Citation: 228 A.C.A. 535.

tective action, did not diverge at all from cases such as *People. v. Mickelson, supra,* which sanctioned a precautionary weapon check outdoors." (*228 Cal. App.2d at p. 470; fn. omitted.)

In the instant case, the officers had just arrested the two occupants of the apartment for possession of a marijuana cigarette. Inspector Martin was informed by one of them that the cigarette had been left there by a person who Martin concluded was defendant and concerning whom he had information as stated above. Among this was information from police records that defendant had a narcotics record and a prior conviction. These circumstances could give the officer good reason to suspect that defendant might be delivering an additional quantity of marijuana cigarettes. Certainly such suspicions would be increased by defendant's conduct at the time when Martin first confronted him—his suddenly becoming very pale and retreating towards the main door of the apartment house. All this warranted investigation by the officer. A temporary stopping of a pedestrian, whether outdoors or indoors, is implicit in any effective investigation. It would be absurd to recognize an officer's right, indeed duty, to investigate and at the same time require him to do so "on the run" should his suspect be so disposed. This is not a case where the police either had made or were in the process of making an unlawful entry upon the premises in order to reach the subject of the investigation. The record discloses, and defendant does

*Advance Report Citation: 228 A.C.A. at p. 539.

not dispute, that they were lawfully in the apartment house. Unlike *People v. Cove, supra,* this is not even a case where the subject of the investigation was in his own dwelling house and the investigatory acts themselves raised the critical question as to whether "Lawful entry, 'the indispensable predicate of a reasonable search,' had been established. [Citation.]" (*People v. Cove, supra,* †228 Cal.App.2d at p. 471.) We therefore conclude, that under the particular facts here involved, it was not unreasonable for the officers to stop defendant for questioning, that reasonable cause for such investigation existed and that while we do not hold the rule set forth in *Mickelson* is per se operative indoors, the circumstances confronting the officers here were not substantially different from situations outdoors where under *Mickelson* similar detentions have been authorized.

After stopping defendant in the hallway and detaining him in the apartment (to which he was going anyhow) the officers were justified in making a superficial ("pat") search for concealed weapons. (*People v. Mickelson, supra,* 59 Cal.2d 448, 450-451; *People v. Gibson* (1963) 220 Cal.App.2d 15, 21 [33 Cal.Rptr. 775].) We believe that after the investigation and "pat" search the officers had probable cause to arrest defendant and make a reasonable incidental search of his person. (*People v. Mickelson, supra,* 59 Cal.2d 448, 450-451; *People v. Lopez, supra,* 60 Cal.2d 223, 241.)

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†Advance Report Citation: 228 A.C.A. at p. 540.

A reasonable search without a warrant is valid where it is incidental to a lawful arrest and a seizure, during such a search, of evidence being used in the commission of the crime for which the arrest is made, is permissible. (*People v. Winston* (1956) 46 Cal.2d 151, 162 [293 P.2d 40]; *In re Dixon* (1953) 41 Cal.2d 756, 761-762 [264 P.2d 513].) "An arrest without a warrant can only be legally made if the person arrested has committed a public offense in the presence of the arresting officer or if the arresting officer has reasonable cause to believe that the person arrested has committed a felony. (Pen. Code, §836; *People v. Boyles,* 45 Cal.2d 652, 655 [290 P.2d 535]; *People v. Simon,* 45 Cal.2d 645, 648 [290 P.2d 531].)" (*People v. Privett* (1961) 55 Cal.2d 698, 701 [12 Cal.Rptr. 874, 361 P.2d 602].) "Reasonable cause has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. [Citations.]" (*People v. Ingle* (1960) 53 Cal.2d 407, 412-413 [2 Cal.Rptr. 14, 348 P.2d 577], cert. denied 364 U.S. 841 [81 S.Ct. 79, 5 L.Ed.2d 65]; *People v. Torres* (1961) 56 Cal.2d 864, 866 [17 Cal. Rptr. 495, 366 P.2d 823], cert. denied 369 U.S. 838 [82 S.Ct. 866, 7 L.Ed.2d 842]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967]; *People v. Swayze* (1963) 220 Cal.App.2d 476, 488 [34 Cal.Rptr. 5]; *People v. Cedeno* (1963) 218 Cal.App.2d 213, 219 [32 Cal.Rptr. 246].) "Where an arrest is lawful the search incident thereto is not unlawful merely because

it precedes rather than follows the arrest. [Citations.]" (*People v. Ingle, supra,* 53 Cal.2d at p. 413; *People v. Hammond* (1960) 54 Cal.2d 846, 853 [9 Cal. Rptr. 233, 357 P.2d 289]; *People v. Torres, supra,* 56 Cal.2d 864, 866.) Each case must be decided on its own facts and circumstances. (*People v. Ingle, supra,* 53 Cal.2d at p. 412.) As this court said in *People v. Bates* (1958) 163 Cal.App.2d 847, 851 [330 P.2d 102]: "The test is, did the officer have reasonable cause to make the arrest—would a reasonable man, possessing the information possessed by the officer, reasonably believe that the person involved had committed a felony?" The question of probable cause to justify the defendant's arrest and search must be tested upon the facts which the record shows were known to the officers at the time the arrest was made. (*People v. Privett, supra,* 55 Cal.2d 698, 701; *People v. Jackson* (1958) 164 Cal.App.2d 759, 761-762 [331 P.2d 63].)

What information did Inspector Martin have at the time of the arrest? As already stated, he had been told by Nadine Sweem that the marijuana cigarette had been left in the apartment on the preceding evening by a person who, as we have explained, Martin concluded to be defendant. While Nadine Sweem was an unreliable informer and her information of itself did not constitute probable cause for arrest (*Willson v. Superior Court* (1956) 46 Cal.2d 291, 294 [294 P.2d 36]; *People v. Cedeno, supra,* 218 Cal.App.2d 213, 219; *People v. Burke, supra,* 208 Cal.App.2d 149, 156; *People v. Goodo* (1956) 147 Cal.App.2d 7, 9 [304 P.2d 776]) it was nevertheless relevant on the issue of

probable cause (*Willson v. Superior Court, supra*). Martin had also learned from police records that defendant had a narcotics record and had observed defendant on the night in question in the company of a person under indictment for narcotic offenses. While these circumstances either singly or together did not of themselves constitute probable cause for arrest they were relevant on the issue of probable cause. (*People v. Reeves* (1964) 61 Cal.2d 268, 274 [38 Cal.Rptr. 1, 391 P.2d 393]; *People v. Privett, supra,* 55 Cal.2d 698, 702; *People v. Sanders* (1956) 46 Cal.2d 247, 251 [294 P.2d 10].) Furthermore, when first confronted by defendant, Martin observed him become very pale and start to retreat to the main door of the building. This too was relevant although it may not have been furtive or suspicious conduct sufficiently corroborative of other information possessed by the inspector so as to constitute probable cause. (See *People v. Cedeno, supra,* 218 Cal.App.2d 213, 224-226.)

The subsequent developments however are highly significant. In the course of the "pat" search, the inspector felt articles in defendant's pocket which *from his past experience* made him suspicious that they were perhaps marijuana cigarettes. As set forth previously, Martin explained his past knowledge as to how marijuana cigarettes are carried. The inspector then asked defendant what was in his pocket whereupon the latter "began to sweat very profusely and he remained very pale." We are satisfied that these developments taken together with the other informa-

tion previously acquired by Martin gave him reasonable cause to believe that defendant had marijuana cigarettes in his pocket and was then committing a felony.[6]

Defendant relies on *People v. Ross* (1963) 223 Cal. App.2d 196 [35 Cal.Rptr. 754] and *People v. Perez* (1963) 219 Cal.App.2d 760 [33 Cal.Rptr. 398] in support of his claim that there was no probable cause for his arrest. Both cases are distinguishable from the case before us. In *Ross* the police, investigating a robbery and shooting and having received a description of two suspects, observed defendant getting into a car occupied by two men wearing clothing similar to that of the robbers. They ordered the men out of the car and searched them for weapons but found none. Because of "conflicting stories" of defendant's com-

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[6]The instant case is therefore another example of reliance by an arresting officer on information supplied by an untested and presumably unreliable informer which is justified because of corroborating knowledge acquired from other sources or from the personal observations of the officer. (*People v. Prewitt* (1959) 52 Cal.2d 330, 337 [341 P.2d 1]; *Willson v. Superior Court, supra,* 46 Cal.2d 291, 295; *People v. Currier, supra,* *232 Cal.App.2d ....; *People v. Singer* (1963) 217 Cal.App.2d 743, 756 [32 Cal.Rptr. 701]; *People v. Acosta* (1963) 213 Cal.App.2d 706, 710 [29 Cal.Rptr. 241]; *People v. Burke, supra,* 208 Cal.App.2d 149, 156; *People v. Davis* (1962) 205 Cal.App.2d 517, 521 [23 Cal.Rptr. 152]; *People v. Rayson* (1961) 197 Cal.App.2d 33, 37-38 [17 Cal.Rptr. 243]; *People v. Gonzales* (1960) 186 Cal.App.2d 79, 82 [8 Cal.Rptr. 704]; *People v. Bates, supra,* 163 Cal.App.2d 847, 852; *People v. Diggs* (1958) 161 Cal.App.2d 167, 171 [326 P.2d 194]; cf. *People v. Reeves, supra,* 61 Cal.2d 268, 273-274; *People v. Pereda* (1964) 229 Cal.App.2d 814, 818 [40 Cal.Rptr. 566]; *Lewis v. Superior Court* (1964) 226 Cal.App.2d 102, 103-104 [37 Cal.Rptr. 773]; *Dunn v. Municipal Court* (1963) 220 Cal.App.2d 858, 871-873 [34 Cal.Rptr. 251]; *People v. Cedeno, supra,* 218 Cal.App.2d 213, 220, 221-222.)

*Advance Report Citation: 232 A.C.A. 152, 156-157.

panions, all men were given "a further search" and their car was searched as well. No evidence of the robbery was revealed but marijuana cigarettes were found in the pocket of defendant's jacket. The court held that since the officers had satisfied themselves that the three men carried no dangerous weapons the further search of defendant could not be upheld as incidental to a lawful arrest. The officers were investigating a robbery and at the time of the further search had no reason to suspect the presence of narcotics.

In *Perez* the court affirmed the dismissal of an indictment because the police had no reasonable cause to believe that defendant (who was arrested for a violation of Health and Safety Code section 11556) had visited a place where narcotics were being unlawfully smoked or used, knowing that such was actually occurring. The evidence showed that defendant could not have possibly known about such activity because it was not going on when he entered the place involved.

We next turn to defendant's contention that the admission in evidence of incriminating statements made by him constitutes reversible error under the rule announced in *People v. Dorado, supra,* *62 Cal. 2d .....

The pertinent facts are as follows: Inspector Martin testified that after he removed the marijuana cigarettes from defendant's pocket he showed them to defendant and asked him where he had obtained them.

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*Advance Report Citation: 62 A.C. 350.

According to Martin "He [Machel] then continued to perspire and remained very pale complected, and he said, 'Can't you give me a break?' He said, 'My wife is away; she has been in Texas visiting friends or relations and she's expected back very shortly,' and that him becoming involved in something like this might complicate his family matters."

The inspector then had a subsequent conversation with defendant in the apartment. "I asked him where he got the joints or the cigarettes and he stated that he had got them a short time before, a few days before, from a male by the name of Rudy around the Mission district, and that he had gotten eight from him and that these were the remaining three that I had taken out of his pocket. He subsequently changed his story and said that he had gotten them from a woman by the name of Sylvia, who lived up on Bush street."

Following the decision of the Supreme Court of the United States in *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], the Supreme Court of California held in *People v. Dorado, supra,* †62 Cal.2d ....., "that defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively in-

†Advance Report Citation: 62 A.C. 350, 365-366.

formed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights."

The record clearly establishes that when defendant made the above statements, Martin's questioning was no longer investigatory but had focused on defendant as a particular suspect. It is simply beyond argument that after the inspector removed the cigarettes from defendant's pocket there was no doubt in his mind that defendant was guilty. It was at this time that defendant was handcuffed, arrested and thus placed in custody. The interrogation productive of the foregoing statements thereupon followed. Defendant's arrest therefore satisfied the first two conditions of the *Dorado* rule "[T]he arrest encompasses two of the circumstances which produced the accusatory stages in the *Escobedo* and *Dorado* cases: (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, and (2) the suspect is in custody." (*People v. Stewart* (1965) *62 Cal.2d ....., ... [43 Cal.Rptr. 201, 400 P.2d 97].)

Has the third condition of the *Dorado* rule been satisfied? Were the above statements made while the officers were carrying on a process of interrogations that lent itself to eliciting incriminating statements? We recognize that defendant's arrest does not of itself compel a conclusion that the third condition of the rule has been met. As was said in *People v. Stewart*,

*Advance Report Citation: 62 A.C. 597, 603.

supra, †62 Cal.2d ....., ... "Although in most cases the process of interrogations following an arrest will so lend itself [to eliciting incriminating statements], it does not necesarily do so." In order to determine whether this condition of the rule has been met, it is necessary to "analyze the total situation which envelops the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." (‡P. .....)

While the pertinent part of the record is meager, our analysis of it convinces us that although Martin then knew defendant possessed contraband, he was attempting to extract from him information concerning his involvement with it. The entire incident bespeaks a persistence of inquiry on Martin's part. It will be recalled that in the course of the pat search, the inspector repeatedly asked defendant what he had in his pocket. After removing the marijuana cigarettes, "I then showed them to Machel and asked him where he got them." The witness recounted defendant's reaction to the question, his plea for a "break" and his fears as to family complications arising from his involvement "in something like this." The officer pressed the inquiry in a subsequent conversation in the apartment although the record does not disclose the interval of time between the two. A fair reading of the record induces the conclusion that there was some

†Advance Report Citation: 62 A.C. 597, 604.
‡Advance Report Citation: 62 A.C. at p. 605.

continuity to the second conversation because defendant gave one answer and "subsequently changed his story." While the questioning sought the source of the contraband, it is clear that it lent itself to establishing defendant's awareness of what he had had in his pocket and his full knowledge of the character of such articles. The interrogation was not casual or merely curious but sustained, deliberate and meaningful. Assuming that the first inquiry made by Martin after removing the cigarettes from defendant's pocket, as to where the latter obtained them, was not in itself a process of interrogation, nevertheless we conclude that when the inspector pressed the inquiry in the subsequent conversation he carried out a process of interrogations which lent itself to eliciting incriminating statements.

Finally the record fails to show that defendant was advised of his right to counsel or of his absolute right to remain silent or that defendant waived these rights. Since the decision in *People v. Stewart, supra,* *62 Cal.2d ..... it is clear that under these circumstances the fourth condition of the *Dorado* rule is satisfied. As the court there said: "We therefore cannot presume in the face of a silent record that the police informed defendant of his right to remain silent and of his right to counsel." (†62 Cal.2d at p. .....)

We therefore conclude that at least with respect to the defendant's statements in the second conversation, all of the conditions of the *Dorado* rule have been

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*Advance Report Citation: 62 A.C. 597.

†Advance Report Citation: 62 A.C. at p. 607.

met and that the admission in evidence of such statements was error. The statements admitted were clearly incriminating in character. Defendant in answering the inspector's inquiries in the subsequent conversation as to *where* he got the cigarettes in each instance admitted not only that he *had* marijuana in his possession but also that *he had been in possession of these* and *other marijuana cigarettes* for some time prior to the time of his arrest. These statements given in response to inquiries using the term "joints" from the addict's argot supported the conclusion not only that defendant knowingly had possession of the cigarettes but that he had knowledge of their narcotic character. These were essential elements of the offense with which he was subsequently charged. (*People v. Groom* (1964) 60 Cal.2d 694, 696 [36 Cal.Rptr. 327, 388 P.2d 359]; *People v. Redrick* (1961) 55 Cal.2d 282, 285 [10 Cal.Rptr. 823, 359 P.2d 255]; *People v. Winston, supra,* 46 Cal.2d 151, 158; *People v. Gorg* (1955) 45 Cal.2d 776, 780 [291 P.2d 469].)

In our view the second series of statements constituted a complete acknowledgment of guilt of the crime charged (*People v. Ferdinand* (1924) 194 Cal. 555, 568-569 [229 P. 341]; *People v. Ford* (1962) 200 Cal. App.2d 905, 920 [19 Cal.Rptr. 758]; Witkin, Cal. Evidence, p. 275; McCormick on Evidence, p. 234) and must be construed as a confession of a violation of the crime with which defendant was charged. (*People v. Mora* (1965) *232 Cal.App.2d ....., ...-..... [42

*Advance Report Citation: 232 A.C.A. 492, 497-499.

Cal.Rptr. 725]; *People v. Collins* (1965) †232 Cal. App.2d ....., ...-..... [43 Cal.Rptr. 57]; cf. *People v. Finn* (1965) ‡232 Cal.App.2d ....., ...-..... [42 Cal.Rptr. 704].) Considered in relation to Martin's repeated inquiry as to where defendant got the *marijuana* cigarettes, defendant's response necessarily admitted all of the essential elements of the crime—defendant's dominion and control over the marijuana, his knowledge of its presence and his knowledge of its narcotic character. (See *People v. Swayze, supra,* 220 Cal.App.2d 476, 492.) Under the rule announced in *Dorado,* the admission in evidence of defendant's statements was reversible error, despite the sufficiency of other evidence to establish the charge. Such error was not waived when defendant took the stand on his own behalf and under cross-examination admitted that he had had three marijuana cigarettes on his person.

The judgment is reversed.

Sullivan, J.

Molinari, J., and Sims, J., concurred.

Filed April 29, 1965,
Lawrence R. Elkington, Clerk.

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†Advance Report Citation: 232 A.C.A. 822, 825-826.
‡Advance Report Citation 232 A.C.A. 515, 519-522.

Appendix B

Order Due
June 28, 1965

In The Supreme Court of The State of California

In Bank

People v. Machel

ORDER DENYING HEARING

After Judgment By District Court of Appeal
1st District, Division 1, Crim. No. 4539

Respondent's petition for hearing DENIED.

McComb, J., and Mosk, J., are of the opinion that the petition should be granted.

Tobriner
Acting Chief Justice

FILED
JUN 23 1965
William I. Sullivan, Clerk
By Birkel
S. F. Deputy